ORIGINAL

No. 91-690

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

WILLIAM THOMAS, et al.,

Petitioners,

V.

WILLIAM J. ELLIOTT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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Counsel for Respondent
William J. Elliott

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, William J. Elliott, moves pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis before this Court. On December 10, 1991, Respondent was requested to file a response to Petitioners' petition for a writ of certiorari in this case. Respondent is currently incarcerated in the Illinois River Correctional Center and is unable to pay the costs of proceeding before this Court or give security therefor. The District Court granted Respondent's leave to proceed in forma pauperis at the beginning of this action. Respondent has completed, signed, and attached an affidavit as required by § 1915.

Accordingly, Respondent respectfuly requests that he be allowed to proceed in forma pauperis.

Walter C. Carlson

IN THE
SUPREME COURT OF THE UNITED STATES

William Thomas, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 91-690
	)	
William J. Elliott,	)	
	)	
Respondent.	)	

AFFIDAVIT TO ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, William J. Elliott, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed before this Court without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that I desire to present to this Court the following: (1) a brief in opposition to Petitioners' Petition for Writ of Certiorari pursuant to the request of this Court; and (2) any other brief or motion that may become necessary in connection with this case.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding before this Court are true.

1. Are you presently employed?

Yes. I earn $30.00 per month as a clerk in the Maintenance Tool Control Department of the Illinois River Correctional Center in Canton, Illinois. I have had similar jobs in my approximately 6 years of incarceration in other Illinois correctional facilities.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Yes. I have received some money from my grandparents as a gift, but no more than approximately $150.00.

3. Do you own any cash or checking or savings account?

Yes. I have approximately $30.00 in an account at the Illinois River Correctional Center.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William J. Elliott
William J. Elliott

SUBSCRIBED AND SWORN to
before me this 7th day of January, 1992.

Mary T. Kuzel
Notary Public

"OFFICIAL SEAL"
MARY T. KUZEL
Notary Public, State of Illinois
My Commission Expires Mar 20, 1993

CERTIFICATE OF SERVICE

I, Carter G. Phillips, hereby certify that one copy of the Respondent's Motion to Proceed in forma pauperis in Williams v. Elliott, No. 91-690, was this 10th day of January, 1992, placed in the United States mail, first-class postage prepaid addressed to the following:

Lawrence Rosenthal
Deputy Corporation Counsel
Frederick S. Rhine
180 N. LaSalle Street
Room 500
Chicago, IL 60601

Carter G. Phillips

No. 91-690

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

WILLIAM THOMAS, et al.,

Petitioners,

V.

WILLIAM J. ELLIOTT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND SUGGESTION OF MOOTNESS

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REASONS FOR DENYING THE WRIT

Petitioners seek certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit in which the court held that it had lacked jurisdiction to review an interlocutory decision of the District Corut. The District Court had denied Petitioners' summary judgment motion on the ground of qualified immunity because the district court found genuine issues of material fact concerning the "merits" of the action. The petition should be denied because the trial of this case and the jury verdict in favor of Petitioners have mooted the issue raised in the petition. In any event, although Petitioners raise an issue of importance to section 1983 plaintiffs, as to which the Courts of Appeals have disagreed, the Seventh Circuit's decision is correct and consistent with the opinions of this Court on qualified immunity and interlocutory appeals.

1. Petitioners filed their petition for a writ of certiorari on October 24, 1991. On two different occasions, petitioners sought a stay from this Court to prevent trial of the action from going forward. On both occasions, Justice Stevens as Circuit Justice denied their motion. Accordingly, this section 1983 action was tried on December 16-20, 1991. On December 20, 1991, the jury returned a verdict in favor of all Petitioners on all counts, and judgment was entered on that verdict on December 23, 1991.

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." Lewis v. Continental Bank Corp., 110 S. Ct. 1249, 1253 (1990). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit." Id. at 1253-54. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983). "In general a case becomes moot 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Murphy v. Hunt, 455 U.S. 388, 396 (1980), quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

As a result of the jury verdict in favor of Petitioners, there is no longer a "case or controversy" in this matter.[1] Petitioners have stood trial and no longer face any risk of liability in this case and, therefore, no longer need the protection of qualified immunity. Indeed, the thrust of

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[1] Because this petition involves an interlocutory appeal, the petition should be dismissed and the Seventh Circuit's decision should remain in effect. The rule articulated in United States v. Munsingwear, Inc., 340 U.S. 36 (1950), that an appellate court should vacate a lower court decision that has become moot on appeal does not apply to interlocutory appeals. See United States v. O'Shaughnessy, 772 F.2d 112, 113 (5th Cir. 1985); see also C. Wright, A. Miller, E. Cooper, 13A Federal Practice & Procedure 2d § 3533.10, pp. 435-36 (general practice under Munsingwear does not apply to interlocutory appeals).

Petitioners' petition was that they were entitled to a pre-trial review of the "merits" of this case. Now that the trial is over, a decision by this Court would have no effect on Petitioners. See Murphy, 455 U.S. at 481 (claim to pre-trial bail moot after conviction). Thus, neither Petitioners nor Respondent has a "personal stake" or "legally cognizable interest" in the issue presented in this petition.

Nor does this petition fall within the "capable of repetition, yet evading review" exception. For the exception to apply, two elements must be present: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." See Weinstein v. Bradford, 423 U.S. 147, 149 (1975). A "reasonable expectation" or a "demonstrated probability" is required; a "mere physical or theoretical possibility" is not enough. Murphy, 455 U.S. at 477.

Neither element is satisfied in this case. First, the challenged action is not too short in duration to be fully litigated. As the proceedings in this Court demonstrate, the district court, the court of appeals, or this Court can grant a stay of a trial pending this Court's review should the issue arise in a future case and a stay be appropriate. Indeed, Petitioners had two different opportunities to seek a stay here. They also (unsuccessfully) sought stays from both the district

court and the Seventh Circuit. Further, summary judgment motions on qualified immunity grounds frequently occur at the early stages of litigation, long before most cases go to trial. Now that the Seventh Circuit has conclusively decided the issue, future rulings should come to this Court "with relative speed." See DeFunis v. Odegaard, 416 U.S. 312, 319 (1973).

Second, there is no "demonstrated probability" that Petitioners will again be denied an interlocutory appeal of a qualified immunity ruling for the same reason challenged here. This Court has no reason to believe that Petitioners will ever again be defendants in a section 1983 action and "once again be in a position to demand" a similar interlocutory appeal. See Murphy, 455 U.S. at 484.[2]

In sum, the trial of this case and the jury verdict in favor of Petitioners have obviated the issue raised in the petition. "The controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse interests.'" DeFunis, 416 U.S. at 317.

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[2] It is immaterial that Respondent may file an appeal of the jury verdict. See Fed. R. App. P. 4 (notice of appeal must be filed within 30 days of final judgment). This Court has held that the possibility of a successful appeal after a jury verdict does not give rise to a "reasonable expectation" under the "capable of repetition, yet evading review" doctrine. See Murphy, 455 U.S. at 482-83.

2. Assuming, arguendo, that the petition is not moot, the writ should be denied because the Seventh Circuit's decision is correct and fully consistent with this Court's opinions addressing qualified immunity and interlocutory appeals. The Seventh Circuit correctly held that public officials are not entitled to automatic pretrial appellate review of summary judgment motions after the district court finds genuine issues of material fact concerning the "merits" of the plaintiff's case. Qualified immunity does not confer on public officials a right of special appeal under such circumstances. Such special treatment would impose unreasonable delay on plaintiffs and undue burden on appellate courts.

Petitioners misinterpret this Court's decisions in Anderson v. Creighton, 483 U.S. 635 (1987), and Mitchell v. Forsyth, 472 U.S. 511 (1985), and stretch those cases well beyond their holdings. Neither Mitchell nor Anderson created such a right of special appeal for public officials, and neither ruled that the finality rule was inapplicable to appeals of qualified immunity rulings on summary judgment.

The Seventh Circuit held that "Mitchell did not create a general exception to the finality doctrine for public employees." Petitioners' App., 5a. This Court has made it clear that the "small class" of appealable interlocutory decisions must satisfy the three criteria of the collateral order doctrine: the decision must be effectively unreviewable after the proceedings

terminate; it must conclusively determine the disputed question; and it must involve a "clai[m] of right separable from, and collateral to, rights asserted in the action." See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Mitchell, 472 U.S. at 524-26. Yet, Petitioners completely ignore the collateral order doctrine and mistakenly focus exclusively on just one of the protections of qualified immunity -- immunity from suit -- to support their jurisdictional argument.

In Mitchell, this Court applied the collateral order doctrine analysis to qualified immunity rulings. This Court held that under limited circumstances a summary judgment motion denying a claim of qualified immunity is an appealable interlocutory order. Stating that qualified immunity was both a defense to liability at trial and an "entitlement not to stand trial or face the other burdens of litigation," Mitchell, 472 U.S. at 526, this Court ruled that a summary judgment order that denies a claim of qualified immunity satisfies the first two criteria of the collateral order doctrine: it conclusively determines an issue (the defendant's right not to stand trial) which cannot be effectively reviewed after trial. Id. at 525-27.

This Court, however, went on to state that the third criterion -- the "separate from the merits" test -- would be satisfied where the qualified immunity issue "can be decided with reference only to undisputed facts and in isolation from the

remaining issues of the case." Mitchell, 472 U.S. at 529-30 n.10 (emphasis added). Thus, this Court found "a claim of immunity . . . conceptually distinct from the merits of the plaintiff's claim" only in very limited circumstances:

> All [the court of appeals] need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Mitchell, 472 U.S. at 528. In a footnote to this passage, this Court again "emphasized" that the appealable issue was a "purely legal one." Id. at 528 n.9. This Court never suggested that the "separate from the merits" criterion would be satisfied when the underlying facts are found to be genuinely in dispute.

This Court's recognition that a public official "is entitled to summary judgment if discovery fails to create a genuine issue as to whether the defendant" committed the alleged acts, did not eliminate the finality rule. Mitchell, 472 U.S. at 526; Anderson, 483 U.S. at 646 n. 6. Indeed, defendants of all types are entitled to summary judgment after discovery if they can show conclusively that the plaintiff's allegations are not true. But neither Mitchell nor Anderson (a case which did not even address the appealability issue) suggested that a public official defendant could automatically appeal a summary judgment

order in which the trial court found a genuine issue of material fact concerning the merits of the action.[3]

When a trial court finds a genuine issue of material fact concerning the merits of the action -- i.e., whether the defendant engaged in the challenged conduct -- an appellate court, as in this case, has no jurisdiction to review whether those facts were properly found to be in dispute. While a summary judgment motion does involve a determination of whether the movant is entitled to judgment as a matter of law, see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986), denial of the motion because of issues of fact is not an appealable interlocutory decision. If it were, then all summary judgment motions would be immediately appealable, and the Court's careful line drawing in Mitchell and Anderson would have been wholly unnecessary. It is only a legal ruling based on undisputed facts, not a determination that there are genuinely disputed facts, that is appealable under Mitchell.

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[3] Indeed, the only time this Court in Mitchell even mentioned summary judgment after discovery was when it made the point that qualified immunity was more than just protection from liability. Mitchell, 472 U.S. at 526. In the "separate from the merits" discussion -- the relevant part of the opinion for this analysis -- the Court referred only to "facts alleged" and "undisputed facts" as the proper basis for a qualified immunity summary judgment appeal. Likewise, when the Court stated in Anderson that "discovery may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved," the Court was referring to discovery "tailored specifically to the question of [the defendant's] qualified immunity" and not the underlying merits of the plaintiff's claims. Anderson, 483 U.S. at 646 n.6.

3. In an effort to support their unwarranted extension of Mitchell and Anderson, Petitioners advance a series of flawed "public policy" arguments. First, they argue that a public official who did nothing wrong (despite the district court's finding of genuinely disputed facts) should be entitled to an interlocutory appeal to the same extent as an official who arguably acted unlawfully. Second, Petitioners contend that appellate courts are faced with the same burden whether they review the factual record of a motion based on an "I didn't do it" defense or on the lack of clarity of the law. Third, they contend that the Seventh Circuit's decision violates the principle that rules governing appellate jurisdiction should be clear.

Petitioners' first argument ignores the finality rule and assumes that the only concern is a public official's right not to stand trial. As Mitchell demonstrates, however, the finality rule is fully applicable to summary judgments for qualified immunity. As this Court has often stated, the finality rule exists to promote "efficient judicial administration" and to avoid "unreasonable disruption, delay, and expense" and "piecemeal appellate review." Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430 (1984). Further, the public official claiming "I didn't do it" is amply protected by the district court's consideration of a motion for summary judgment. If the district judge concludes that there are disputed issues of fact as to whether the public official violated clearly established rights,

such a defendant should stand trial just as should all other defendants bringing unsuccessful motions for summary judgment. In short, Petitioners' argument has it backwards; by placing more value on qualified immunity than the finality rule, it unjustifiably would allow public officials to impose "unreasonable disruption, delay, and expense" in every case in which a plaintiff attempts to vindicate constitutional rights.

Likewise, Petitioners' second argument is unconvincing. It is much less burdensome for an appellate court to review a trial court's purely legal qualified immunity ruling based on undisputed facts than to review in addition the trial court's determination of what facts are actually in dispute. Further, Petitioners' argument that Mitchell's focus was on a public official's right not to stand trial rather than on the burdens imposed on a court of appeals ignores the Court's emphasis that the finality rule and collateral order doctrine apply to qualified immunity rulings. Unless a qualified immunity ruling satisfies the criteria of the collateral order doctrine, the "disruption, delay, and expense" of an interlocutory appeal outweigh a public official's right not to stand trial.

The third argument is simply wrong. An interlocutory appeal is available only when the district court makes a qualified immunity ruling based on uncontested facts. Where, however, the district court finds the facts concerning the "merits" to be genuinely in dispute, there is no appellate

jurisdiction. There is no ambiguity as to when a denial of a claim of qualified immunity is appealable.

4. Petitioners' statement that the Seventh Circuit's decision conflicts with every other Court of Appeals that has considered the issue is incorrect. The Second, Eleventh, and Fifth Circuits agree with the Seventh Circuit. In Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991), the Second Circuit ruled that it "lack[ed] jurisdiction over" an appeal of a denial of summary judgment on the grounds of qualified immunity because the district court had found "unresolved disputed questions of fact." Id. at 927. The court stated "[s]ignificant to the instant appeal is the rule that review is limited to those cases that can be decided as a matter of law, not ones that turn on disputed issues of fact." Id. at 926. Petitioners' attempt to explain away this holding defies logic.

In Riley v. Wainwright, 810 F.2d 1006 (11th Cir. 1986), the Eleventh Circuit held that it had no jurisdiction to review the district court's denial of the defendant's motion for summary judgment on qualified immunity because the district court had found that the case "required substantial factual development." Id. at 1007; see also Hudgins v. City of Ashburn, 890 F.2d 396, 403 (11th Cir. 1989) ("If questions of material fact are present, then we are without jurisdiction under 28 U.S.C. § 1291 to review that decision since the case will proceed to trial for resolution of those factual questions.")

Likewise, the Fifth Circuit in Lion Boulos v. Wilson, 834 F.2d 504 (5th Cir. 1987), held that a denial of a qualified immunity claim was not immediately appealable where "the district court was unable to resolve [a] factual issue based on the conflicting versions of the [parties]." Id. at 508. Although there had been no discovery in Boulos, the Fifth Circuit's reasoning applies equally well to a summary judgment after discovery in which a district court is unable to resolve a factual dispute.

Other Courts of Appeals have taken a different position on this issue, but Petitioners exaggerate the differences. In Ramirez v. Webb, 835 F.2d 1153 (6th Cir. 1987), for example, the Sixth Circuit did not hold that an appellate court has jurisdiction to review an interlocutory appeal of a district court's finding of genuinely disputed facts. In Ramirez, the district court had not determined that the facts of the defendants' "I didn't do it defense" were in dispute; rather, the district court had not made any relevant factual findings. Accordingly, the court held that the issue was not "ripe for review." Id. at 1159.

Likewise, in Unwin v. Campbell, 863 F.2d 124 (1st Cir. 1988), the First Circuit was not asked to review the trial court's determination of the disputed facts; rather, the court held that in light of Anderson the district court had improperly

reviewed only the allegations in the plaintiff's complaint and then proceeded to review the factual record. Id. at 132. Moreover, in Unwin, Judge Breyer dissented on the basis articulated by the Seventh Circuit: that purely factually based appeals were beyond the rationale articulated in Mitchell for allowing interlocutory review. Id. at 137-41. Likewise, in Brown v. Grabowski, 922 F.2d 1097 (3rd Cir. 1990), the facts before the Third Circuit were "essentially uncontested;" thus, the court was able to make a pure legal ruling on the qualified immunity issue. Id. at 1101.

Neither the Ninth Circuit nor the Eighth Circuit has given the issue significant consideration. The Ninth Circuit's summary reasoning in Burgess v. Pierce County, 918 F.2d 104, 106 n. 3 (9th Cir. 1990), that the "question of immunity is conceptually distinct from the plaintiff's claim on the merits, since it is the legal question of whether there are genuine issues for the jury" failed to answer the question; a sufficiency-of-the-evidence "legal question" is present in every summary judgment motion. Similarly, in Wright v. South Arkansas Regional Health Center, 800 F.2d 199, 202-03 (8th Cir. 1986), the Eighth Circuit identified the problem, and then "nevertheless," without any reasoning, found the appeal proper merely because it was "fully consistent with the spirit" of Mitchell.

In sum, the Seventh Circuit's decision is consistent with this Court's decisions on qualified immunity and

interlocutory appeals. It strikes the correct balance between the policies undergirding qualified immunity and the need to avoid "unreasonable disruption, delay, and expense" and "piecemeal appeallate review." Although the decisions of the Seventh Circuit and three other circuits are different from those of certain Courts of Appeals, the differences do not warrant granting certiorari in this case.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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January 10, 1991

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January 10, 1992

William K. Suter
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Williams v. Elliott, No. 91-690

Dear Mr. Suter:

Enclosed please find a motion to proceed in forma pauperis in the above case. Also enclosed for filing, are twelve typewritten copies of Respondent's Brief in Opposition to the Petition For A Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit in the above-referenced case, as well as the original certificate of service for this filing, and a Notice of Appearance for counsel of record.

Thank you for your assistance in this matter.

Sincerely,

Carter G. Phillips

Enclosures

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 91-690

WILLIAM THOMAS, ET AL. (Petitioner) *vs.* WILLIAM J. ELLIOTT (Respondent)

The Clerk will enter my appearance as Counsel of Record for RESPONDENT WILLIAM J. ELLIOTT
(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Walter C. D. Carl

(Type or print) Name WALTER C. D. CARLSON

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm SIDLEY & AUSTIN

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Rule 9

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.